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1 UNITED STATES PATENT AND TRADEMARK OFFICE

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4 BEFORE THE BOARD OF PATENT APPEALS
5 AND INTERFERENCES
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8 *Ex parte* RABINDRANATH DUTTA and
9 RICHARD SCOTT SCHWERDTFEGER
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12 Appeal 2008-2985
13 Application 09/838,368
14 Technology Center 3600
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17 Decided: December 22, 2008
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20 Before HUBERT C. LORIN, ANTON W. FETTING, and
21 JOSEPH A. FISCHETTI, *Administrative Patent Judges*.
22 FETTING, *Administrative Patent Judge*.

23 DECISION ON APPEAL

24 STATEMENT OF THE CASE

25 Rabindranath Dutta and Richard Scott Schwerdtfeger (Appellants) seek review
26 under 35 U.S.C. § 134 of a final rejection of claims 6-7, 10, 12-16, 23, 25, 32, 36-
27 38, the only claims pending in the application on appeal.

28 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

29
30 We AFFIRM.

1 The Appellants invented a system and method for backing up data for a battery
2 operated device (Specification: page 1, lines 6-7).

3 An understanding of the invention can be derived from a reading of exemplary
4 claims 6 and 10, which are reproduced below [bracketed matter and some
5 paragraphing added].

6 6. A method for backing up data, the method comprising:

7 [1] establishing at a server a connection with a wireless device
8 over a wireless network using a wireless protocol;

9 [2] pushing, over the wireless network to the wireless device, a
10 request to backup data, wherein the step of pushing the
11 request comprises

12 [a] sending a textual based service load to a proxy server,

13 [b] wherein the service load provides a uniform resource
14 identifier for an application that the wireless device
15 may retrieve to transmit the data to the server, and

16 [c] wherein the proxy server is configured to translate the
17 textual based service load to a binary based service
18 load and

19 [d] send the translated binary based service load to the
20 wireless device;

21 [3] receiving the data from the wireless device; and

22 [4] storing the data on a storage device coupled to the wireless
23 network.

24 10. A method on a proxy server for facilitating data backup, the
25 method comprising:

26 [1] receiving a request in a first protocol from a backup
27 server for a wireless client to backup data to the backup
28 server,

29 wherein the request is a textual based service load
30 providing the client with a uniform resource identifier
31 for an application which will identify, locate, and
32 transmit the requested data to the backup server;

- 1 [2] translating the request formatted in the first protocol into
2 a translated request formatted in a second protocol,
3 wherein the second protocol is compatible with the
4 wireless client;
5 [3] sending the translated request to the wireless client over a
6 wireless network;
7 [4] receiving over the wireless network the data from the
8 wireless client formatted in a third protocol;
9 [5] translating the data formatted in the third protocol into
10 translated data formatted in a fourth protocol compatible
11 with the backup server; and
12 [6] sending the translated data to the backup server.
13

14 This appeal arises from the Examiner's Final Rejection, mailed August 11,
15 2006. The Appellants filed an Appeal Brief in support of the appeal on May 29,
16 2007. An Examiner's Answer to the Appeal Brief was mailed on September 4,
17 2007. A Reply Brief was filed on November 2, 2007.

18 PRIOR ART

19 The Examiner relies upon the following prior art:

Muir et al.	US 6,088,515	July 11, 2000
Zarom	US 6,356,529 B1	March 12, 2002
Lazaridis et al.	US 6,401,113 B2	June 4, 2002

20
21 REJECTIONS

22 Claims 6-7, 14-16, 25, and 36-38 stand rejected under 35 U.S.C. § 103(a) as
23 unpatentable over Lazaridis and Muir.

Claims 10, 12-13, 23, and 32 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Lazaridis, Zarom, and Muir.

ISSUES

The issues pertinent to this appeal are

- Whether the Appellants have sustained their burden of showing that the Examiner erred in rejecting claims 6-7, 14-16, 25, and 36-38 under 35 U.S.C. § 103(a) as unpatentable over Lazaridis and Muir.
- Whether the Appellants have sustained their burden of showing that the Examiner erred in rejecting claims 10, 12, 13, 23, and 32 under 35 U.S.C. § 103(a) as unpatentable over Lazaridis, Zarom, and Muir.

The pertinent issue turns on whether the references describe a wireless device that retrieves and executes an application identified by a uniform resource identifier.

FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

Lazaridis

01. Lazaridis is directed towards a system and method for information stored on a host system and duplicating the information onto a mobile device (column 1, lines 14-15).

02. Lazaridis establishes a wireless connection between a server and a wireless device using a wireless gateway (column 6, lines 9-17).

1 03. Lazaridis is configured as a two-way push: pushing information from
2 the mobile device to the host system or pushing information from the
3 host system to the mobile device (column 3, lines 46-56 and column 4,
4 lines 54-56).

5 04. Lazaridis sends the information to a mobile device as text through a
6 redirector program (column 6, lines 29-31).

7 05. Lazaridis has the host server receive information from the mobile
8 devices, such as networked events (column 7, lines 30-33).

9 06. Lazaridis describes the redirector program as residing on the host
10 system or mobile device and submits commands defined by the user to
11 push items to the mobile device or the host system (column 2, lines 20-
12 25, column 3, lines 46-56, and column 4, lines 46-56).

13 07. The user-defined commands are created on the host and pushed to the
14 mobile device (column 6, lines 56-63). The redirector program executes
15 upon a trigger (column 6, lines 64-67). The trigger causes execution of
16 the redirector. Such a trigger is effectively a command because it causes
17 such an execution of a program in a manner equivalent to a batch
18 command. Among the triggers is a command from some external
19 computer or the host server to back up (column 7, lines 15-28).

20 08. Lazaridis stores data on a storage device in the network (column 7,
21 lines 43-45 and column 8, lines 39-43).

22 09. Lazaridis selectively identifies data located in the database to be
23 transmitted to the mobile device (column 7 lines 8-13).

Muir

10. Muir is directed towards a program that permits an application to be executed at one location and the results of this execution are displayed at a second location (column 1, lines 54-55).

11. Muir is concerned with the remote execution of application located on another computer or server (column 1, lines 45-51). This server may be accessed by TCP/IP which is the internet communication protocol (column 5, lines 7-9).

12. Muir has a configuration file that corresponds to a specific application and a specific application execution server. The configuration file contains the name and the node location of the application and is accessed by the user selecting a textual hyperlink (column 3, lines 18-30).

13. The configuration file starts a client agent which communicates to the application execution server. The named application is started on an application server separate from the machine which selects the application, which requires that the name of the application be sent to the application server for execution (column 3, lines 18-30).

Zarom

14. Zarom is directed to a system and method for translating data to and from the wireless application protocol (WAP) format (column 1, lines 1-3).

15. Zarom translates WAP instructions to HTTP and TCP/IP instructions and vice versa (column 2, lines 8-10).

Facts Related To The Level Of Skill In The Art

16. Neither the Examiner nor the Appellants has addressed the level of ordinary skill in the pertinent art of data backup. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (“[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error ‘where the prior art itself reflects an appropriate level and a need for testimony is not shown’”) (quoting *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985)).

17. One of ordinary skill knew that a uniform resource identifier was a textual description of either the name alone or of the name, location, and method of access of a resource in a standardized format¹.

Facts Related To Secondary Considerations

18. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

Obviousness

A claimed invention is unpatentable if the differences between it and the prior art are “such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.” 35 U.S.C. § 103(a) (2000); *KSR Int’l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1729-30 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14 (1966).

¹ See RFC 3986 at <http://tools.ietf.org/html/rfc3986>

Group III Claims 14-16, 25, and 36-28

Group I

The Examiner found that Lazaridis teaches all of the limitations of claim 6 except limitation [2], “a uniform resource identifier for an application that the wireless device may retrieve to transmit the data to the server” (Answer p. 4). The Examiner found Muir describes this limitation (Answer p. 4). The Examiner concluded that it would have been obvious to combine Lazaridis and Muir in order to benefit the client device by enabling backup services without storing the backup program on the wireless device (Answer p. 4).

The Appellants contend that Muir fails to teach limitation [2], “wherein the step of pushing the request comprises sending a textual based service load to a proxy server, wherein the textual based service load provides a uniform resource identifier for an application that the wireless device may retrieve and execute on the wireless device in order to transmit the data to the server” (Supplemental Br. Pages 11-12). Appellants specifically contend that Muir fails to describe 1) a request to backup data is *pushed* to the client device, and this *push* includes sending a service load containing the uniform resource locator (Supplemental Brief page 11, last paragraph), 2) the Muir configuration file merely contains information and is not *executed* (Supplemental Brief page 12, first paragraph), 3) Muir fails to describe that the wireless device may *retrieve* and *execute* an application identified by the uniform resource identifier (Supplemental Brief page 12, second paragraph), and 4) Lazaridis fail to teach “pushing...a *request* to backup data” (Supplemental Br. Page 11, last paragraph).

1 We disagree with the Appellants. First, only limitation [2] is being contested
2 and we find that all other limitations are described by Lazaridis (FF 02, FF 03, FF
3 04, FF 05, and FF 08).

4 Appellants first contend that Muir fails to describe “a pushing a request to
5 backup data” (Supplemental Br. Page 11, last paragraph). Appellants’ contention
6 that Muir fails to teach this limitation does not persuade us of error on the part of
7 the Examiner because the Appellants respond to the rejection by attacking the
8 references separately, even though the rejection is based on the combined
9 teachings of the references. Nonobviousness cannot be established by attacking
10 the references individually when the rejection is predicated upon a combination of
11 prior art disclosures. *See In re Merck & Co. Inc.*, 800 F.2d 1091, 1097, 231 USPQ
12 375, 380 (Fed. Cir. 1986). The Examiner applied Lazaridis to describe this
13 limitation (Answer p. 3, last paragraph). Thus, the argument that Muir fails to
14 describe “a push request to backup data” is not found persuasive.

15 Appellants next contend that the Muir configuration file merely contains
16 information and is not *executed* (Supplemental Brief page 12, first paragraph). We
17 do not find this argument persuasive because there is no positive recitation of the
18 execution of an application in claim 6. Claim 6 only requires that the application
19 be “retrieved”; there is no requirement that the application be *executed*.

20 The Appellants further contend that Muir fails to describe that the wireless
21 device may *retrieve* and *execute* an application identified by the uniform resource
22 identifier (Supplemental Brief page 12, second paragraph). First, claim 6 explicitly
23 recites that the wireless device *may* retrieve and execute an application. This
24 conditional limitation does not require that these retrieval and execution steps be
25 performed. As such, this argument is not found persuasive. Furthermore, claim 6

1 does not recite a functional limitation that the application be executed as discussed
2 above. As such, the argument that Muir fails to describe execution of the
3 application is not found persuasive.

4 With respect to retrieving the application identified by the uniform resource
5 identifier, Muir describes pointing to the location of the application in the
6 configuration file from a hyperlink (FF 12) and the remote execution of the
7 application (FF 10). A uniform resource identifier is just that, a resource identifier.
8 Its uniform aspect is simply one of textual format that specifies at least the name of
9 the resource. Functionally, a uniform resource identifier is a text string that
10 identifies a system resource (FF 17). One of ordinary skill would have formatted
11 such a text string according to the particular communication protocols used. In an
12 internet environment, which Muir allows for (FF 10), this would have been as a
13 uniform resource identifier.

14 The configuration file content functionally operates as a uniform resource
15 identifier because it textually specifies the name and location of the resource to be
16 executed, and its pointing to the location of the application for execution implies
17 retrieving the application.

18 The Appellants additionally contend that Lazaridis fails to describe
19 “pushing...a *request* to backup data (Supplemental Br. Page 11, last paragraph). In
20 other words, the Appellants are contending that the present invention is
21 distinguished because it claims the pushing of the command as contrasted with
22 data to backup data.

23 The Appellants’ argument fails to consider the full scope of Lazaridis.
24 Lazaridis describes user-defined trigger events (commands) in order to perform
25 some function, such as data transfer, between the host system and the mobile

1 device (FF 06). These user-defined triggers can be created on the host and pushed
2 to the mobile device or vice versa (FF 07). The redirector program executes upon
3 a trigger, i.e. the trigger causes the execution of the redirector. Such a trigger is
4 effectively a command because it causes such an execution of a program in a
5 manner equivalent to a batch command. Among the triggers is a command from
6 some external computer or host server to back up data. Thus, where the redirector
7 is stored on a mobile device, the request command to back up data is pushed to the
8 mobile device from an external computer or server. Since there is a two-way push
9 between the host system and mobile device, all external command trigger events
10 (commands) created on the host system are pushed to redirector on the mobile
11 device (FF 07).

12 The Appellants have not sustained their burden of showing that the Examiner
13 erred in rejecting claim 6 under 35 U.S.C. § 103(a) as unpatentable over Lazaridis
14 and Muir for the above reasons.

15
16 *Group II*

17 Claim 7 further requires sending a request by the wireless device to the proxy
18 server to retrieve the application identified by the uniform resource identifier,
19 receiving the application by the wireless device, and executing the application by
20 the wireless device to transfer the data requested to be backed up. The Examiner
21 found that Lazaridis teaches all of the limitations of claim 7 except for the
22 limitation of “sending a request by the wireless device to the proxy to retrieve
23 the application identified by the uniform resource identifier and receiving the
24 application by the wireless device” (Answer p. 4). The Examiner found that Muir
25 teaches this limitation (Answer p. 5). The Examiner concluded that it would have
26 been obvious to combine Lazaridis and Muir in order to benefit a client device by

1 providing it with the address of the backup program and thereby not storing the
2 backup program on the wireless device (Answer p. 5).

3 The Appellants contend the Examiner erred by rejecting claim 7 for the same
4 reasons as set forth for claim 6 (Supplemental Br. Page 13, third paragraph).
5 Appellants additionally contend that Muir fails to teach the additional limitations
6 (Supplemental Br. Page 13, third paragraph). Appellants specifically contend that
7 Muir teaches a configuration file is read by the client device and the present
8 invention requires that an application is received and executed by the wireless
9 device (Supplemental Br. Page 13, third paragraph).

10 We disagree with the Appellants. First, claim 7 is distinguished from claim 6
11 in that the steps of *receiving* and *executing* are positively recited.

12 The Appellants contend that Muir fails to describe the *receiving* and *executing*
13 of the application by the wireless device (Supplemental Br. Page 13, third
14 paragraph). We disagree. Muir describes the receiving of the application. As
15 discussed above, Muir describes a configuration file that specifies an application
16 (FF 12) and the remote execution of the application (FF 10). The configuration file
17 is a uniform resource identifier and its pointing to the location of the application is
18 functionally equal to receiving the application.

19 The Appellants further contend that Muir fails to describe *executing* the
20 application (Supplemental Br. Page 13, third paragraph). We do not find this
21 argument persuasive because the Examiner has not relied on Muir to describe this
22 limitation. The Examiner found that Muir described the application is executed on
23 the server and not by the wireless device (Answer Page 5, second paragraph). The
24 Examiner has relied on Lazaridis to teach this limitation (Answer Page 5, second
25 paragraph). As discussed above, Lazaridis describes triggers that cause the

1 execution of a redirector program (FF 07), which can be executed on the server or
2 the wireless device (FF 06 and FF 07). As such, the Appellants arguments are not
3 found persuasive.

4 The Appellants have not sustained their burden of showing that the Examiner
5 erred in rejecting claim 7 under 35 U.S.C. § 103(a) as unpatentable over Lazaridis
6 and Muir for the above reasons.

7 *Group III*

8 Appellant argues claims 14-16, 25, and 36-38 as a group.

9 Accordingly, we select claim 14 as representative of the group.
10 37 C.F.R. § 41.37(c)(1)(vii) (2007).

11 The Examiner found that Lazaridis teaches all of the limitations of claim 14
12 except for the limitation of “the command from the backup service comprises a
13 location of an application to be executed by the wireless client” (Answer p. 6).
14 The Examiner found that Muir taught this limitation (Answer p. 6). The Examiner
15 concluded that it would have been obvious to combine Lazaridis and Muir in order
16 to benefit client device by providing it with the address of the backup program and
17 thereby not storing the backup program on the wireless device (Answer p. 6).

18 The Appellants contend Lazaridis fails to teach “receiving a command to
19 *backup* data from a backup server” (Supplemental Br. Page 14) and as such, there
20 is no motivation to modify Lazaridis to include such a feature (Supplemental Br.
21 Page 14). Appellants further contend that Lazaridis teaches away from a feature to
22 backup data by describing continuous pushing of data (Supplemental Br. Page 14).

23 We disagree with the Appellants. The Appellants first contend that Lazaridis
24 fails to teach “receiving a command to *backup* data from a backup server”
25 (Supplemental Br. Page 14). As discussed above, Lazaridis does describe

1 receiving a command to backup data from a server (FF 06 and FF 07). This
2 argument was found to be insufficient to overcome the Appellants burden of
3 showing the Examiner error *supra* and is found insufficient here as well for the
4 same reasons.

5 The Appellants additionally contend that there is no motivation to combine
6 Lazaridis and Muir (Supplemental Br. Page 14). We disagree. Muir is concerned
7 with the remote execution of an application (FF 11) and Lazaridis is concerned
8 with the two-way pushing of commands such that the commands can be executed
9 at either location (FF 04). Thus, Lazaridis and Muir are both concerned with the
10 same problem of remote execution. The Appellants further contend that Lazaridis
11 teaches away from a command to backup data (Supplemental Br. Page 14) and
12 thus there would not be any motivation to modify Lazaridis. We are not persuaded
13 by this because Lazaridis, as discussed above, expressly teaches the pushing of a
14 command to back up data (FF 06 and FF 07).

15 The Appellants have not sustained their burden of showing that the Examiner
16 erred in rejecting claims 14-16, 25, and 36-38 under 35 U.S.C. § 103(a) as
17 unpatentable over Lazaridis and Muir for the above reasons.

18 *Claims 10, 12-13, 23, and 32 stand rejected under 35 U.S.C. § 103(a) as*
19 *unpatentable over Lazaridis, Zarom, and Muir.*

20 The Appellants argue the above-listed claims in two groups:

21 Group IV Claims 10, 12-13, and 32

22 Group V Claim 23

23

24 *Group IV*

1 The Appellants argue claims 10, 12-13, and 32 a group. Accordingly, we
2 select claim 10 as representative of the group. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

3 The Examiner found that Lazaridis teaches all of the limitations of claim 10
4 except “providing the client with a uniform resource”, “translating the request
5 formatted in the first protocol into a translated request formatted in a second
6 protocol, wherein the second protocol is compatible with the wireless client”, and
7 “translating the data formatted in the third protocol into translated data formatted
8 in a fourth protocol compatible with the backup server” (Answer p. 8). The
9 Examiner found that Muir and Zarom teaches these limitations (Answer p. 8). The
10 Examiner then concluded it would have been obvious to combine Lazaridis, Muir,
11 and Zarom in order to allow for a wireless device to have data backup without
12 storing the backup program on the wireless device (Answer p. 9).

13 The Appellants reiterate the contentions from claim 6 and further contend that
14 Muir fails to teach the application “will identify, locate, and transmit the requested
15 data to the backup server” (Supplemental Br. Page 15).

16 We disagree with the Appellants. First, limitation [1] is the only limitation
17 contested and we find that Lazaridis and Zarom teach the other limitations (FF 02,
18 FF 03, FF 04, FF 05, FF 08, and FF 15).

19 The Appellants first contend that Muir fails to teach a request to backup data
20 from a backup server and the request is a service load that provides the wireless
21 device with a uniform resource identifier for an application (Supplemental Br.
22 Page 15). As discussed above, the Examiner has not relied on Muir to describe a
23 request to backup data. This argument was found to be insufficient to overcome
24 the Appellants burden of showing the Examiner error *supra*, and is found to be
25 insufficient here as well for the same reasons.

1 The Appellants next contend that Muir fails to describe the request is a service
2 load that provides the wireless device with a uniform resource identifier for an
3 application (Supplemental Br. Page 15). As discussed above, Muir describes a
4 configuration file that points to a specific application (FF 12) and the remote
5 execution of the application (FF 10). The configuration file is a uniform resource
6 identifier and its pointing to the location of the application is functionally equal to
7 receiving the application. This argument was found to be insufficient to overcome
8 the Appellants burden of showing the Examiner err *supra* and is found to be
9 insufficient here as well for the same reasons.

10 The Appellants further contend that Muir fails to describe the application “will
11 identify, locate, and transmit the requested data to the backup server”
12 (Supplemental Br. Page 15). Appellants’ contention that Muir fails to teach this
13 limitation does not persuade us of error on the part of the Examiner because the
14 Appellants respond to the rejection by attacking the references separately, even
15 though the rejection is based on the combined teachings of the references.
16 Nonobviousness cannot be established by attacking the references individually
17 when the rejection is predicated upon a combination of prior art disclosures. *See In*
18 *re Merck & Co. Inc.*, 800 F.2d 1091, 1097, 231 USPQ 375, 380 (Fed. Cir. 1986).
19 The Examiner has only relied on Lazaridis to reject this limitation (Answer p. 7).
20 Thus, the argument that Muir fails to describe the application “will identify, locate,
21 and transmit the requested data to the backup server” is not found persuasive.
22 Furthermore, we find that Lazaridis does describe selectively identifying data to be
23 transmitted to the mobile device, where the data is located in the database (FF 09).

24 The Appellants have not sustained their burden of showing that the Examiner
25 erred in rejecting claims 10, 12-13, and 32 under 35 U.S.C. § 103(a) as
26 unpatentable over Lazaridis, Zarom, and Muir for the above reasons.

Group V

The Examiner found that claim 23 is rejected for the same reasons as claim 10 *supra*.

The Appellants contend that the Examiner erred in rejecting claim 23 for substantially the same reasons as argued for claim 6.

We again disagree with the Appellants. The Appellants' arguments with respect to claim 6 were found to be insufficient to overcome the Appellants burden of showing the Examiner err *supra* and are found to be insufficient here as well for the same reasons.

The Appellants have not sustained their burden of showing that the Examiner erred in rejecting claim 23 under 35 U.S.C. § 103(a) as unpatentable over Lazaridis, Zarom, and Muir for the above reasons.

CONCLUSIONS OF LAW

The Appellants have not sustained their burden of showing that the Examiner erred in rejecting claims 6-7, 10, 12-16, 23, 25, 32, 36-38 under 35 U.S.C. § 103(a) as unpatentable over the prior art.

DECISION

To summarize, our decision is as follows:

- The rejection of claims 6-7, 14-16, 25, and 36-38 under 35 U.S.C. § 103(a) as unpatentable over Lazaridis and Muir is sustained.
- The rejection of claims 10, 12-13, 23, and 32 under 35 U.S.C. § 103(a) as unpatentable over Lazaridis, Zarom, and Muir is sustained.

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Application 09/838,368

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

JRG

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